Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MND, OLC, CNL, MT, O, FF

Introduction

This hearing was convened in response to cross applications.

On June 03, 2016 the Landlord filed an Application for Dispute Resolution in which the Landlord applied for a monetary Order for damage and to recover the fee for filing this Application for Dispute Resolution.

The Landlord stated that on June 03, 2016 the Application for Dispute Resolution, the Notice of Hearing, and 8 pages of evidence submitted with the Application were sent to the Tenants, via registered mail. The male Tenant acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On September 07, 2016 the Landlord filed an Amendment to an Application for Dispute resolution, in which she reduced the amount of her monetary claim to $1,390.25. The Landlord stated that this Amendment reduced the amount of her monetary claim by $575.00 to reflect her desire to apply the security deposit to the amount she believes is owed by the Tenants. On the basis of information provided with the Amendment I find that the Landlord applied to keep the security deposit in this Amendment.

The Landlord stated that on September 07, 2016 the Amendment to an Application for Dispute Resolution was sent to the Tenants, via registered mail. The male Tenant acknowledged receipt of this document.

On November 04, 2016 the Tenants filed an Application for Dispute Resolution in which the Tenants applied to cancel a Notice to End Tenancy for Landlord's Use of Property; for more time to cancel a Notice to End Tenancy; for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act*) or the tenancy agreement; for "other" and to recover the fee for filing this Application for Dispute Resolution. At the hearing the Tenants withdrew the application to cancel a Notice to End Tenancy and for more time to apply to cancel a Notice to End Tenancy.

The male Tenant stated that on November 07, 2016 the Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via private courier. The Landlord acknowledged receipt of these documents.

On November 06, 2016 the Tenants filed an Amendment to an Application for Dispute resolution, in which they added a claim for the return of their security deposit. The male Tenant stated that on November 07, 2016 the Amendment to an Application for Dispute Resolution was sent to the Landlord, via private courier. The Landlord acknowledged receipt of this document.

On June 06, 2016 the Landlord submitted 5 pages of evidence to the Residential Tenancy Branch. The Landlord stated that these documents were mailed to the Tenants with the Application for Dispute Resolution. The male Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

On June 07, 2016 the Landlord submitted 2 pages of evidence and a USB device to the Residential Tenancy Branch. The Landlord stated that these documents were mailed to the Tenants on June 05, 2016 or June 06, 2016. The male Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On July 06, 2016 the Tenant submitted 16 pages of evidence and a USB device to the Residential Tenancy Branch. The male Tenant stated that this evidence was served to the Landlord on July 06, 2016, via private courier. The Landlord acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On September 08, 2016 the Landlord submitted 11 pages of evidence to the Residential Tenancy Branch. The Landlord stated that these documents were mailed to the Tenants on September 07, 2016. The male Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

On November 08, 2016 the Tenant submitted 9 pages of evidence and a USB device to the Residential Tenancy Branch. The male Tenant stated that this evidence was served to the Landlord on November 07, 2016, via private courier. The Landlord acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On November 15, 2016 the Landlord submitted 6 pages of evidence to the Residential Tenancy Branch. The Landlord stated that these documents were mailed to the Tenants on November 15, 2016. The male Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Landlord entitled to compensation for damage to the rental unit?

Are the Tenants entitled to the return of their security deposit?
Are the Tenants entitled to compensation related to service of a Two Month Notice to End Tenancy?

Background and Evidence

The Landlord and the Tenants agree that:

- the tenancy began on November 01, 2015;
- the tenancy was for a fixed term, the fixed term of which ended on November 01, 2016;
- the tenancy ended on September 01, 2016;
- the Tenants agreed to pay monthly rent of $1,150.00 by the first day of each month;
- the Tenants paid a security deposit $575.00;
- the Tenants paid a pet damage deposit of $575.00;
- the Landlord did not complete a condition inspection report at the start of the tenancy;
- the Landlord served the Tenants with a Two Month Notice to End Tenancy that declared that the Tenants must vacate the rental unit by September 01, 2016;
- the Two Month Notice to End Tenancy declared that the tenancy was ending because the landlord, or a close family member of the landlord, intended to occupy the rental unit;
- a condition inspection report was completed at the end of the tenancy;
- the Tenants provided a forwarding address, in writing, on September 01, 2016;
- the Landlord did not have written authority to retain the Tenants' security deposit;
- the Landlord returned the Tenants' pet damage deposit of $575.00 on September 01, 2016; and
- the Landlord has not returned the security deposit.

The Landlord is seeking compensation, in the amount of $1,965.25, for repairing water damage.

In support of the claim for water damage the Landlord stated that:

- in January of 2016 water leaked from the deck of the rental unit into the lower rental unit, which is owned by a third party;
- the leak was the result of a blockage in the drain in the deck;
- she believes the firewood stored on the deck contributed to the blockage;
- the water leaked because the Tenants allowed leaves and ice to accumulate on their deck and block the drain in the deck;
- she understands that the property management company took steps to ensure the drain does not freeze again;
- the drain has not clogged again since the initial incident in January; and

- in November of 2015 the Strata Corporation delivered a newsletter to all units that address several issues, including reminding occupants to keep the decks clear of leaves.

In response to the claim for water damage the male Tenant stated that:

- on January 06, 2016 the occupant of the lower unit reported that water was leaking in their unit;
- they reported the problem to the property management company on January 07, 2016;
- the property management company cleared the drain on their deck of ice and leaves;
- the property management company asked them to watch the drain to ensure it does not become clogged again;
- the drainage problems continued after the firewood was removed on January 07, 2016;
- on January 09, 2016 they noticed the drain was not draining properly and they reported it to the property management company;
- the property management company installed a heating cord on January 12, 2016;
- there have been no further problems since January 12, 2016;
- the firewood and barbecue they were storing on the balcony did not block the drain;
- he believes the draining problems are related, in part, to structural issues with the balcony; and
- he does not recall receiving notice that they needed to keep the drains clear of debris.

The Witness for the Landlord stated that:

- he used to work for the property management company that maintains this residential complex;
- when he went to the rental unit in January of 2016 he observed ice and water on the deck;
- the drain had been partially blocked with ice and leaves, resulting in a “slow flow”;
- heat cord was installed to prevent further icing;
- no other drains were clogged during the year;
- the roof above the deck does not full cover the deck, which allows a large amount of water to flow onto the deck; and
- he knows that every fall the Strata Corporation reminds occupants to keep the drains clear of leaves, by delivering notices to their mail boxes.

The Tenants are seeking compensation, pursuant to section 51(2) of the *Act*, because the Landlord did not move into the rental unit after the tenancy ended.

The Landlord stated that:

- she intended to move into the rental unit after the tenancy ended but her circumstances changed;
- the rental unit remained vacant for September of 2016; and
- she re-rent the unit for October 02, 2016.

The Tenants are seeking compensation of $496.00 for moving costs. The Tenants argue that they would not have incurred these costs if the Landlord had not served the Two Month Notice to End Tenancy which they contend was served in bad faith and which should never have been served due to the fact the fixed term of the tenancy had not expired.

I have reviewed all of the digital evidence submitted in evidence.

Analysis

When making a claim for damages under a tenancy agreement or the *Act,* the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss.

I find that the Landlord has submitted insufficient evidence to establish that the water damage that occurred in January of 2016 was the result of the Tenants breaching the *Act*. As the Landlord has failed to meet the burden of proving that the water damage was the result of the Tenants breaching the *Act,* I dismiss her claim for compensation for that damage.

In determining that there was insufficient evidence to establish that the Tenants breached the *Act* I was influenced, in part, by the digital images of the deck that were taken after the blockage was detected. These images do not show that firewood, nor any other property belonging to the Tenants, was covering the drain. I find that the images also show that an excessive amount of leaves had not accumulated on the deck.

In determining that there was insufficient evidence to establish that the Tenants breached the *Act* I was influenced, in part, by the testimony of the Witness for the Landlord, who declared that the drain was only partially blocked.

In determining that there was insufficient evidence to establish that the Tenants breached the *Act* I was influenced, in part, by the digital images of the deck and surrounding area that show a large amount of water pours onto, and accumulates on, the deck. I find it reasonable to conclude that the drain, even if it was partially blocked

by ice and leaves, would have been able to the clear water from the deck if the design did not result in such a large accumulation of water.

In determining that there was insufficient evidence to establish that the Tenants breached the *Act* I was influenced, in part, by the absence of anything in the *Act* or Residential Tenancy Branch Policy Guidelines that requires tenants to maintain gutters or exterior drains. Typically landlords are required to clean gutters during a tenancy and I find that this obligation would extend to drains on decks, particularly when the drain is exposed to large amounts of water, as is the case in these circumstances.

On the basis of the testimony of the Landlord and the Witness for the Landlord I find that on an annual basis the Strata Corporation sends a newsletter to occupants which, in part, reminds occupants of the need to keep the drains clear of ice and debris. I find it likely that the Strata Corporation sends this reminder, in part, because of the amount of water that collects on the decks. Even if I concluded that the Landlord had the right to download this responsibility to the Tenants, I find that she was obligated to clearly communicate that expectation to the Tenants.

I find that the Landlord did not take sufficient steps to ensure the Tenants understood the importance of keeping the drain clear. I find that providing that information in a newsletter is not sufficient, as occupants may not understand that the newsletter contains important information. I find that the Landlord had an obligation to specifically address this issue with the Tenants if she wanted them to take responsibility for ensuring the drain remained clear.

On the basis of the undisputed evidence I find that the Landlord failed to comply with section 23(4) of the *Act* when she did not complete a condition inspection report at the start of the tenancy.

Section 24(2)(c) of the *Act* stipulates that a landlord's right to claim against the security deposit or pet damage deposit for damage is extinguished if the landlord does not comply with section 23(4) of the *Act.* As I have concluded that the Landlord failed to comply with section 23(4) of the *Act*, I find that the Landlord's right to claim against the security deposit and pet damage deposit for damage is extinguished.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or make an application for dispute resolution claiming against the deposits. In circumstances such as these, where the Landlord's right to claim against the security deposit has been extinguished, the Landlord does not have the right to file an Application for Dispute Resolution claiming against the deposit and the only option remaining open to the Landlord is to return the security deposit and/or pet damage deposit within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing.

As the Landlord has not yet returned the security deposit, I find that the Landlord did not comply with section 38(1) of the *Act.*

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act* the Landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord did not comply with section 38(6) of the *Act*, I find that the Landlord must pay double the security deposit to the Tenants.

I note that the Landlord did comply with section 38(1) of the *Act* in regards to the pet damage deposit, as that deposit was returned on September 01, 2016.

Section 51(2) of the *Act* stipulates that if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

On the basis of the undisputed evidence I find that the Landlord did not, after this tenancy ended, use the rental unit for the purpose stated in the Two Month Notice to End Tenancy that was served to the Tenants. I therefore find that the Tenants are entitled to the equivalent of double the monthly rent, pursuant to section 51(2) of the *Act.* Double the monthly rent is $2,300.00.

On the basis of the undisputed evidence I find that this tenancy was a fixed term tenancy, the fixed term of which ended on November 01, 2016. As landlords do not have the right to end a fixed term tenancy pursuant to section 49 of the *Act* prior to the end of the fixed term of the tenancy, I find that the Landlord did not have the right to end this tenancy on September 01, 2016.

Section 49(3) of the *Act* authorizes a landlord to end a tenancy if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. Section 49(8) of the *Act* gives a tenant the right to dispute a notice to end tenancy that has been served pursuant to section 49 of the *Act* if the tenant believes the landlord does not have the right to end the tenancy, including the belief that the Landlord does not intend, in good faith, to occupy the rental unit.

The undisputed evidence is that the Tenants did not dispute the Two Month Notice to End Tenancy that declared they must vacate the unit by September 01, 2016.

Section 7(2) of the *Act* stipulates that a landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this *Act,* the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I find that the Tenants should have exercised their right to dispute the Two Month Notice to End Tenancy if they did not wish to vacate the rental unit on September 30, 2016, in which case they may not have incurred the moving expenses they are claiming. I find that the Tenants are not entitled to recover their moving costs as they did not adequately mitigate this loss, as is required by section 7(2) of the *Act*.

In adjudicating the claim for moving costs I was further influenced by the section 51(1) of the *Act*, which requires landlords to pay tenants the equivalent of one month's rent if the landlord ends the tenancy pursuant to section 49 of the *Act*. This payment serves to compensate tenants for the inconvenience and expense of moving. A party cannot collect this payment and then seek compensation for those same expenses.

I find that the Landlord has failed to establish the merit of her Application for Dispute Resolution and I therefore dismiss her application to recover the fee for filing an Application for Dispute Resolution.

I find that the Tenants' Application for Dispute Resolution has merit and that they are entitled to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Tenants have established a monetary claim, in the amount of $3,550.00 which includes double the security deposit ($1,150.00); double the monthly rent ($2,300.00); and $100.00 in compensation for the fee paid to file this Application for Dispute Resolution.

Based on these determinations I grant the Tenants a monetary Order for $3,550.00. In the event the Landlord does not voluntarily comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: November 30, 2016

Residential Tenancy Branch